MALAYAN UNION REPORTS.

CHOH WAI SUNG v. PUBLIC PROSECUTOR.

[App. Criminal Juris. (Willan, C.J. (Malayan Union), Murray-Aynsley, C.J. (Singapore) and Pretheroe, J.) September 5, 1946]

Public Order and Safety Proclamation, Section 3 (1) — Carrying arms — Factors to be taken into consideration in assessing quantum of punishment — When death penalty should be imposed — Criminal Procedure Code, Section 113 — Whether Statement to a police officer may be used after conviction to help in assessing sentence.

The facts in this case were that the appellant, a youth of eighteen years of age, was challenged by a Detective Sub-Inspector at 9.40 a.m. on the 1st May 1946, on a road which lay on the outskirts of the town of Ipoh. When challenged the appellant at once threw a revolver on the ground and tried to make away. The Detective Sub-Inspector arrested the appellant, picked up the revolver and found it loaded with six rounds of ammunition. Both the revolver and ammunition were in a serviceable condition. After the appellant had been convicted on his plea of guilty and prior to sentence, Crown Counsel read out in Court a statement which the appellant had made to the Police after his arrest. In that statement the appellant had admitted that he was carrying the revolver for the purpose of committing robbery. In his grounds of judgment the trial judge stated that he was partly influenced by this motive in sentencing the appellant to death. The appellant appealed against sentence.

Held, (1) that the Crown Counsel was wrong in referring to the statement of the appellant to the Police in Court and that the learned trial Judge was also wrong in taking it into account in assessing the amount of sentence.

(2) that as in this case the appellant had made no attempt to use the revolver which he was carrying but had at once thrown it away when challenged and taking into account in favour of the appellant his youth and his previous clean record, the sentence of death should be reduced to one of ten years' rigorous imprisonment.

Cases referred to :—

(1) *R. v. Campbell* (1911) 6 Cr. App. Reports 132.

(2) *R. v. Everitt* (1913) 8 Cr. App. Reports 156.

(3) *R. v. Van Pelz* 59 T.L.R. 115.

(4) *R. v. Harrison* (1909) 2 Cr. App. Reports 94.

S. K. Das for the appellant.

E. N. Griffith-Jones for the respondent.

The judgment of the Court of Appeal was delivered by:

Willan, C. J. :—The appellant, a youth of eighteen years of age, was charged with, and pleaded guilty to, the offence of carrying arms contrary to section 3 (1) of the Public Order and Safety Proclamation No. 50, promulgated on the 31st of January, 1946. Section 3 (1) reads as follows :—

> Any person who carries arms shall on conviction be punishable with death or with penal servitude for life or with imprisonment for a term which may extend to ten years and shall also be liable to a fine.

In the same proclamation "arms" is defined as including "any fire-arm, air-gun, air-pistol, automatic gun, automatic pistol and any other kind of gun or pistol from which any shot, bullet or other missile can be discharged or noxious fumes can be emitted, and any kind of fire-arm whether of the same kind as those enumerated or not and also includes any hand grenade".

The facts of this appeal are that the appellant was challenged by a Detective Sub-Inspector at 9.40 p.m. on the 1st May, 1946, on a road which lay on the outskirts of the town of Ipoh. When challenged the appellant at once threw a revolver on the ground and tried to make away. The Detective Sub-Inspector arrested the appellant, picked up the revolver and found it loaded with six rounds of ammunition. Both the revolver and ammunition were in a serviceable condition.

After the appellant had been convicted on his plea of guilty and prior to sentence, Crown Counsel read out in Court a statement which the appellant had made to the police after his arrest. In that statement the appellant had admitted that he was carrying the revolver for the purpose of committing robbery. In his grounds of judgment the trial Judge states that he was partly influenced by this motive in sentencing the appellant to death.

The appellant has appealed against sentence on three grounds :—

(a) His youth.

(b) That he has no previous convictions against him;

(c) That the trial Judge was wrong in taking into account the statement made by the appellant to the police, because such statement is not admissible in evidence.

Dealing with ground (c) first, this raises the important point as to whether a statement made to the police by an accused person can be used by the prosecution at his trial for the purpose of demanding a severe sentence.

The relevant provisions of the law dealing with the use to which statements made to the police can be put are contained in section 113 of the Criminal Procedure Code, which is as follows :—

> 113 (i) No statement made by any person to a police officer in the course of a police investigation made under this chapter shall be signed by the person making it, nor shall such statement, save as herein provided, be used in evidence.
>
> (ii) When any witness is called for the prosecution or for the defence, other than the accused, the Court shall on the request of the accused or the prosecutor refer to any statement made by such witness to a police officer in the course of a police investigation under this Chapter, and may then, if the Court thinks it expedient in the interests of justice, direct the accused to be furnished with a copy thereof, and such statement may be used to impeach the credit of such witness in the manner provided by the Evidence Enactment.
>
> (iii) Nothing in this section shall be deemed to apply to any statement falling within sections 27 and 32 (i) of the Evidence Enactment.
>
> (iv) When any person is charged with any offence in relation to the making or contents of any statement made by him to a police officer in the course of a police investigation under this Chapter such statement may be used as evidence in such prosecution.

Clearly, by sub-sections (i) and (ii) the statement made by the appellant to the police would not have been admissible in evidence, and if the appellant had not pleaded guilty, it could not have been proved in evidence against him at his trial. Since he pleaded guilty, do the provisions of section 113 of the Criminal Procedure Code prevent the prosecution making use of such statement after conviction and before sentence, for the purpose of demanding a severe sentence? The answer to that question will, of course, equally apply to cases where an accused person, who did not plead guilty, has been convicted after evidence led in a trial.

In order to assess the proper quantum of punishment evidence can be properly adduced after verdict or plea of guilty either (a) in mitigation of sentence, or (b) police evidence — see *Roscoe's* Criminal Evidence, 15th Edition, page 314. In England it has been a long established practice for a responsible police officer to be present at the trial to tell the Court, after a verdict of guilty, what he knows about the prisoner as a result of enquiries made by him. But that practice does not absolve the police from proving such information in evidence if the prisoner or his counsel challenges it — see *R. v. Campbell*[1]. And there must be strict proof — see *R. v. Everitt*[2].

The case of *R. v. Campbell* (supra) was enlarged upon by the Court of Criminal Appeal in the recent case of *R. v. Van Pelz*[3]. That case contains observations on the practice to be followed when a police officer, after an accused person has been convicted, is called to make a statement to the Court concerning the accused. The following passage appears in that judgment :—

> It is also the duty of counsel for the prosecution to see that a police witness, when speaking on all these matters, is kept in hand, and is not allowed, much less invited, to make allegations which are incapable of proof.

The important words in that passage are "incapable of proof".

Hence it would not be proper for the police to give information to the Court, which, if challenged, they could not prove in evidence. In this case now under appeal the provisions of section 113 of the Criminal Procedure Code clearly make the appellant's statement to the police inadmissible in evidence, and the appellant's rights under that section should have been safe-guarded. Crown Counsel was wrong in referring to the statement in Court, and the trial Judge was also wrong in taking it into account in assessing the amount of punishment.

This brings us to the very difficult question of assessing the quantum of punishment for offences committed against the provisions of section 3 (1) of the Public Order and Safety Proclamation, No. 50. The history of that section commenced with the promulgation, by the British Military Administration, of the Explosives and Fire-arms Proclamation, No. 19, on the 18th October, 1945. By that Proclamation all persons, other than members of the armed forces or the police, were called upon to surrender by, the 31st October, 1945, all explosives and fire-arms in their possession. Failure to do so was punishable with imprisonment not exceeding three years, fine not exceeding five hundred dollars or both such imprisonment and fine. The object of this proclamation was to get in as many fire-arms as possible, due to the state of lawlessness in the country immediately following the Japanese occupation.

By the Explosives and Fire-arms (Amendment) Proclamation, No. 27, promulgated by the British Military Administration on 12th December 1945, possession or control of explosives or fire-arms after the 31st of October 1945, was made an offence with the punishments just mentioned.

Both these Proclamations were repealed by the Public Order and Safety Proclamation, No. 50, also promulgated by the British Military Administration, and this last named Proclamation, which has been continued in operation by the Civil Government by virtue of the Transfer of Powers and Interpretation Ordinance, 1946, creates a special offence of carrying arms which is punishable with death, penal servitude for life or ten years rigorous imprisonment, with the addition of a fine. This Proclamation was undoubtedly continued in force by the Civil Government because of the number of crimes which still continued to be committed in which arms are used.

There are a number of offences in the Penal Code where alternative punishments of penal servitude for life or rigorous imprisonment not exceeding a maximum term of years are prescribed, but there are only six offences in that Code where the death penalty is added as a third punishment. These six offences are contained in sections 121, 132, 194, 305, 307 and 396. I have perused the commentaries on those sections and have been unable to find any useful guide of when, and when not, the death penalty should be imposed. It is this question which makes the consideration of the right and proper punishment to to be imposed for offences against section 3 (1) of the Public Order and Safety Proclamation a difficult matter.

The general principles that should determine the amount of punishment for a particular crime are laid down in *Halsbury's* Laws of England (*Hailsham* edition), vol. 9, paragraph 364. They are :—

> If a crime has been committed which is of a kind calculated to inspire great alarm, as manifesting a very mischievous disposition, or is specially rife in a particular district or throughout the country, it may be necessary to award a very severe punishment and to take away from the offender the power of committing such a crime or any crime for a long period. If the crime is less dangerous, and the offender may be allowed to return to society after a shorter period of detention, the punishment should possess qualities calculated to reform or to intimidate him, or if there are exceptional circumstances, punishment may be respited and the offender may be given a chance of leading an honest life under a condition that if he does not do so he will be subjected to punishment.

Clearly the offence of carrying fire-arms is one "calculated to inspire great alarm" and "is specially rife" in the State of Perak, because there are four appeals to this Court of Criminal Appeal against convictions for that offence in Perak alone.

In prescribing three varying punishments for this offence the Legislature must have intended the Courts to take into consideration the particular circumstances of each individual case before passing sentence. Where the legislature has prescribed varying sentences in descending order of severity for a particular offence, the maximum sentence should be reserved for the worst cases of the particular offence — see *R. v. Harrison*[4]

In addition to the offence of carrying arms being calculated to inspire alarm amongst the population, it must be remembered that where a person is carrying a loaded revolver at night, as in this case now under appeal, then for whatever purpose it is being carried there is the chance that he may use it in furtherance of that purpose or to defend himself if anyone should attempt to prevent him from carrying out that purpose. That, as we see it, is the reason why the Courts must regard this as a very serious offence.

It is impossible for this Court to lay down with particularity when, and when not, the sentence of death should be imposed for the commission of this offence. Each case must be decided on its own particular circumstances. There is, however, a very wide difference between the case of a person who, at night, is found wandering about with a loaded fire-arm, and the case of a person who, in broad day-light, is found carrying an unloaded revolver.

Since the main purpose of carrying loaded fire-arms is to commit crimes by violence, if necessary, some difference as regards the quantum of punishment ought to be made between those cases, on the one hand, where fire-arms are used, i.e. fired, or where there is an actual attempt to use them, and cases, on the other hand, where no such use or attempt is made. If persons carrying arms are sufficiently determined to carry out their unlawful purpose by using or attempting to use fire-arms, then the punishment in those cases ought to be death. But where, on the other hand, persons found carrying fire-arms neither use nor attempt to use them to resist arrest or otherwise, such cases ought not to be classified along with the worst type of cases which we have enumerated above. Accordingly, in this latter type of cases, penal servitude for life, or rigorous imprisonment not exceeding ten years, according to the circumstances of each case, would be the appropriate punishment.

Where persons operate together as a gang with a common intention and, in furtherance of that common intention, one or other member of the gang uses, i.e. fires, or attempts to use, the fire-arm with which he is armed, then the death penalty might properly be imposed not only on him but also on every other

member of the gang who is found armed, even though that other member neither uses nor attempts to use the fire-arm with which he is armed. Once common intention is proved, no armed member of such gang ought to be allowed to excuse himself by saying that he did not know nor anticipate that some other member of the gang would use, i.e. fire, or attempt to use, the fire-arm with which that other member was armed.

Failure of the Courts to differentiate between the facts of individual cases with regard to sentence, and failure to reserve the death sentence for the worst cases, would only be an incentive to a person found carrying a fire-arm to resist arrest by using it because he would receive no greater penalty by such use. In fact such failure would be an encouragement to the armed person to shoot his way out at all costs to escape arrest.

Keeping in mind the factors just stated, and applying them to the particular facts of this case now under appeal, where the appellant made no attempt to use the loaded revolver which he was carrying, but at once threw it away when challenged; also ignoring the appellant's statement to the police wrongly referred to at the trial; and in favour of the appellant taking into account his youth, he is not more than eighteen years of age, and his previous clean record, we reduce the sentence of death to one of ten years rigorous imprisonment to commence from the date of conviction.

Sentence reduced.

PANG FOOK AND ANOTHER v. PUBLIC PROSECUTOR.

[App. Criminal Juris. (Willan, C.J. (Malayan Union), Murray-Aynsley, C.J. (Singapore) and Pretheroe, J.) September 5, 1946]

Public Order and Safety Proclamation Section 3 (1) — Criminal Procedure Code, Section 160 — Accused originally charged with abetment of extortion charged at commencement of trial with offence under Section 6 and 3 (1) of the Public Order and Safety Proclamation — No adjournment granted and no counsel assigned to accused — Appeal allowed.

The facts in this case were as follows:—

The second appellant, Yap Chew Chai, supplied the first appellant, Pang Fook, with a loaded revolver which the first appellant used to commit the offence of extortion at Kepong, at about 8 p.m. on the 21st March, 1946. The victim chosen was a Chinese druggist who, when threatened by the first appellant, closed with him. In the ensuing struggle the first appellant fired his revolver three times and inflicted three separate and distinct gun shot wounds on the druggist. One of the bullets which hit the druggist passed dangerously near his heart but he was not killed. The first appellant was charged and convicted on three charges (1) Carrying arms contrary to Section 3 (1) of the Public Order and Safety Proclamation, (2) Extortion contrary to Section 387 of the Penal Code and (3) Attempted murder contrary to Section 307 of the Penal Code. On the first charge he was sentenced to death, on the second charge to five years rigorous imprisonment, and on the third charge to penal servitude for life. The second appellant was at first charged with one offence only, namely that of abetment of extortion contrary to Sections 109 and 387 of the Penal Code. At the commencement of the trial of both the appellants Crown Counsel applied to add a second charge against the second appellant viz. that of conspiring with the first appellant to commit the offence of carrying arms contrary to Sections 6 and 3 (1) of the Public Order and Safety Proclamation. The learned Judge acceded to this request of Crown Counsel, and the trial proceeded without the second appellant having had adequate notice that he would have to meet another charge of an offence for which one of the prescribed punishments is death, and also without counsel having been assigned to defend him. He was convicted and sentenced to three years rigorous imprisonment on the first charge and to death on the second charge. Both appellants appealed to the Court of Appeal against their convictions and sentences.

Held, (1) that as regards the first appellant, there were no merits in the appeal and no grounds whatsoever for reducing his sentence of death.

(2) that as regards the second appellant, he was clearly prejudiced by having to face the second charge without adequate notice and therefore his appeal against his conviction under the Public Order and Safety Proclamation must be allowed and a retrial ordered.

E. E. C. Thuraisingam for the appellants.

E. N. Griffith-Jones for the respondent.

The judgment of the Court of Appeal was delivered by:

Willan, C. J. :—In this case the first appellant was convicted on the three following charges :—

1. Carrying arms contrary to section 3 (1) of the Public Order and Safety Proclamation, No. 50.
2. Extortion, contrary to section 387 of the Penal Code.
3. Attempted murder contrary to section 307 of the Penal Code.

On the first charge he was sentenced to death, on the second charge to five years rigorous imprisonment, and on the third charge to penal servitude for life.

The second appellant was convicted on the following two charges :—